DOCUMENT RESUME

ED 296 447 EA 020 095

AUTHOR Shaughnessy, Mary Angela
TITLE A Primer on School Law: A Guide for Board Members in Catholic Schools.
INSTITUTION National Catholic Educational Association, Washington, D.C.
REPORT NO ISBN-1-55833-000-3
PUB DATE 88
NOTE 54p.
AVAILABLE FROM Publications, National Catholic Educational Association, 1077 30th St. N.W., Washington, DC 20007 ($6.60).
PUB TYPE Guides - Non-Classroom Use (055)

EDRS PRICE MF01/PC03 Plus Postage.
DESCRIPTORS *Board of Education Role; *Catholic Educators; Catholic Schools; *Compliance (Legal); Constitutional Law; Court Litigation; Educational Policy; Elementary Secondary Education; *Legal Responsibility; *School Law; Search and Seizure; State Church Separation; Student Rights; Teacher Discipline; Teacher Dismissal; Teacher Rights; Torts

ABSTRACT

This booklet provides prospective and current Catholic school board members with basic information concerning civil law as it affects schools in general and Catholic schools in particular. Chapter 1 describes the two main types of Catholic school boards: consultative boards, in which the pastor of the diocese has final authority to accept the recommendations; and boards with limited jurisdiction, constituted by the pastor to govern the parish education program, subject to certain decisions reserved to the pastor and the bishop. Chapter 2 outlines the laws affecting Catholic education in the United States, including constitutional law, statutes and regulations, common law, and contract law. Chapter 3 discusses tort liability of schools, focusing on cases brought against schools for negligence, corporal punishment, search and seizure, and defamation. Chapter 4 discusses the duties and rights of school employees, particularly with regard to discipline and dismissal of teachers. Chapter 5 discusses the duties and responsibilities of board members to the diocese and church, to the principal, to teachers, and to parents, students, and the community. The concluding chapter offers general recommendations to Catholic board members for dealing with tort law, for developing a parent/student handbook that expresses the school board's philosophy, and for adhering to due process. A glossary of terms is included. (TE)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED296447

A Primer on School Law:

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

P. Kobus

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

EA 020 095

EA

A Primer on School Law:

A GUIDE FOR BOARD MEMBERS IN CATHOLIC SCHOOLS

by
Mary Angela Shaughnessy, SCN

National Catholic Educational Association

© National Catholic Educational Association, 1988
ISBN: 1-55833-000-3

TABLE OF CONTENTS

		page
Preface		v
About the Author		vii
Chapter 1	Types of Catholic School Boards	1
Chapter 2	The Laws Affecting Catholic Education in the United States	5
Chapter 3	Tort Liability of Schools	15
Chapter 4	Duties and Rights of School Employees	23
Chapter 5	Duties and Responsibilities of Board Members	29
Chapter 6	Conclusions and Recommendations	35
Glossary of Terms		43
Bibliography		46
Index		47

PREFACE

he years since the second Vatican Council have witnessed an ever-increasing role for the laity in the Church, especially in our Catholic schools. School board membership is one way that the laity share in the teaching ministry of the Church. At no time in our history has the role of the school board been more important than it is now. What school board members do is crucial to the mission of Catholic schools.

Good school board members are invaluable. Principals and pastors want them; parishes and dioceses need them. Generous, qualified people are usually forthcoming. But these people have a need and a right to know the legal implications of their membership on Catholic school boards. Too many lawsuits involving schools have reached the courts and made the front pages. Board members should be concerned. Questions frequently asked are "What are my legal responsibilities? For what can I be held personally liable? Does the school, parish or diocese have liability insurance that will protect board members? Can I be sued as an individual for actions of the board?". These are intelligent questions and people should ask them before committing themselves to board membership.

Canon, or Church law governs Catholic schools. Catholic schools and board members have no authority to act outside the provisions of canon law. But within the provisions of canon law, Catholic schools have great freedom so long as no civil laws are broken. Indeed, Catholic schools have much wider latitude in the development of policies and rules than do their public school counterparts.

This book is written as an introduction to the civil law principles affecting Catholic schools and Catholic school board members. Consequently, the main focus of this work is on civil law. Readers desiring more knowledge of canon law and educational governance are advised to consult the 1987 NCEA publication, *A Primer on Educational Governance in the Catholic Church*, which deals in greater detail with canon law and its requirements.

Special gratitude is expressed to Lourdes Sheehan, R.S.M., Executive Director of the National Association of Boards of Education of the National

Catholic Educational Association, for her encouragement and support of this project.

Thanks are also extended to the various persons throughout the country who have participated in school law classes and workshops given by the author. The sharing of hopes, problems and dreams has enabled the author to continue in her work.

Gratitude is extended to Miriam Corcoran, SCN, of Louisville, Kentucky for her proof-reading of this text and for her editorial advice. Thanks are also extended to Karen Juliano of Melrose, Massachusetts for her helpful critique.

The author also extends gratitude to members of the Our Lady of Nazareth Academy, Wakefield, Massachusetts Board of Directors, 1978-86; for teaching her much about what it means to be a Catholic school board. Specific thanks are offered to those persons who served as chair of the board during that time period: Wanda Banks, SCN, now of Louisville; Mrs. Ruth Sawin of Wakefield, Massachusetts; Mr. Paul Dunn of Malden, Massachusetts; and William Skulley, Esq. of Wakefield, Massachusetts.

Finally, the author wishes to dedicate this work to three persons who remain an inspiration to her. This work is dedicated to her friend and mentor, Dr. Lester Przewlocki, Professor of Education at Boston College and to her parents, Corine Bratten Shaughnessy of Louisville and the late Edward M. Shaughnessy, Jr.

ABOUT THE AUTHOR

Sister Mary Angela Shaughnessy, SCN, Ph.D.

ister Mary Angela Shaughnessy is a Sister of Charity of Nazareth, Kentucky who has taught at all levels of education from elementary through graduate school. She served as principal of a Catholic school for eight years. She received a Bachelor of Arts degree in English from Spalding University, Louisville. She holds a Master's degree in English from the University of Louisville and a Master's degree in educational administration from Spalding. In 1985 Sister received her Ph.D. in educational administration and supervision from Boston College. Her dissertation, *Student and Teacher Rights in Private Schools: Legal Considerations for the Administrator,* is the first dissertation to deal exclusively with law in the elementary and secondary non-public schools. Sister has given over 200 workshops and lectures on non-public school law across the country. She has been a speaker at the NCEA Convention for the past three years. Currently, Sr. Mary Angela is Assistant Professor of Education and Director of the Principalship and Supervision Programs at Spalding University. She is also Adjunct Professor in the Catholic School Leadership Program at Boston College.

CHAPTER 1

Types of Catholic School Boards

he 1987 NCEA booklet adopts two main models for boards of Catholic schools that are owned by the diocese: consultative and boards with limited jurisdiction. In the past, terms such as advisory and policy-making have been used. For the sake of consistency, the terms "consultative" and "boards with limited jurisdiction" will be used in this study.

A consultative board is one generally established by the pastor or by diocesan policy. This board has responsibilities for the development and/or approval of policies. The pastor has the final authority to accept the recommendations of the consultative board. It would seem that the consultative model would be most effective if the pastor and principal are members of the board who are in regular attendance at meetings. This would help to insure that the canon law principles of collegiality would function. If the pastor and principal are not in regular attendance, the board members could view themselves as functioning in a vacuum. If the pastor regularly decides not to follow the decisions of the board, members could view their role as useless. Thus, even though such a consultative board is strictly speaking, advisory, the school's best interests would be served if the board is able to use a consensus model of decision-making whenever possible. Consensus does not necessarily mean that everyone agrees that a certain action is the best possible action or one's personal preference; rather, consensus means that all members have agreed to support the decision for the sake of the school. For example, a board member might personally have selected a different principal than the one the board appoints if the board member had sole responsibility for appointing the principal; because other board members prefer a given candidate, the board

member agrees to support that candidate. It is important to note that consensus does not mean that the minority agrees to go along with the majority; it means that all members can support a decision; sometimes, the majority will support the choice of the minority if it is clear that the minority, in all good conscience, cannot support the action that the majority favors.

A board with limited jurisdiction has been defined as one "constituted by the pastor to govern the parish education program, subject to certain decisions which are reserved to the pastor and the bishop" (CACE/NABE, 27). This type of board would have, in both theory and practice, more autonomy in decision making than would the consultative board because the pastor has delegated decision-making power to the board with limited jurisdiction. Pastors and bishops can delegate power, but they cannot delegate their ultimate responsibility for actions taken in their parishes or dioceses. The responsibility of a superior for the actions for those under him or her has roots in civil law as well as in canon law. The civil law doctrine of "respondeat superior" requires that a superior must answer for the actions of a subordinate. Generally, if a Catholic school board is sued for its actions, the pastor and the bishop will be sued as well. Private schools owned by religious congregations or other bodies, such as boards of trustees, may have either consultative boards or boards with limited jurisdiction. The board of a school owned by a religious congregation would relate to the administrator of the religious congregation in the same manner as a parish school board would relate to a pastor.

Private schools may utilize a type of structure called a "corporate board". Those who operate the school would incorporate under state law. A corporate charter and by-laws would be established. This corporate body would be the ultimate authority except in those areas reserved to the bishop. (CACE/NABE, p. 36). Canon law requires that a private school wishing to call itself Catholic have the permission and recognition of the bishop. Traditionally, a Catholic school must be subject to the bishop in matters of faith and morals. Canon law requires that the bishop exercise supervision over the religious education programs of schools and those who teach in such programs. Private Catholic schools and their board members, therefore, must understand and accept the bishops' authority in these matters; to attempt to act in a manner contrary to the wishes of the bishop could place a school's continuation as a Catholic school at risk.

There is a small but growing number of traditionally Catholic schools that have dropped the word "Catholic" from their official titles and have begun to call themselves, for example, "St. Christopher's School, an independent school in the Catholic tradition." It is important for all involved in the governance and educational ministry of such an institution to under-

stand that one cannot be both truly Catholic and completely independent. To be a Catholic school requires that the authority of the bishop as outlined in canon law be recognized. Before a decision to drop "Catholic" from a school's name is made, the ramifications should be thoroughly considered.

Many consultative boards function like boards with limited jurisdiction. The present movement towards government by collegiality and consensus sometimes results in little, if any, formal vote-taking; therefore, in practice, it is often difficult to distinguish between consultative boards and boards with limited jurisdiction.

School boards in Catholic schools have an important role. It is crucial that board members understand that power is vested in the board as a body, not in individual members. Board members must understand what the role of the board is—the development of policy. Even if the policies have to be approved at a higher level, board members must understand their role in terms of policy.

Policy is usually defined as a guide for discretionary action. Thus, policy will dictate what the board wishes to be done. Policy is not concerned with administration or implementation; that is, the board should not become involved in *how* its directives will be implemented or with the specific persons who will implement them. For example, a board might state as a policy that students are to wear uniforms. The board would not be concerned with what company provides the uniforms or with what color they are. Such questions are administrative ones; they are to be dealt with by the principal who is the chief executive officer of the school and also the chief executive officer of the board. Administrative decisions are the day-to-day management choices of the principal. It is important for everyone to understand these distinctions from the beginning.

Generally, boards will set policies in these major areas: program, finance and personnel. The board may also have responsibility in the area of plant maintenance. Board members, therefore, need to know the broad parameters of the law as it affects Catholic education.

The purpose of this book is to provide prospective and current Catholic school board members with basic information concerning civil law as it impacts schools in general and Catholic schools in particular. A court would probably expect that a person who accepts membership on a school board would have some rudimentary understanding of the laws that apply to that school system.

CHAPTER 2

The Laws Affecting Catholic Education in The United States

he laws affecting education in the United States today can generally be classified in four categories: (1) constitutional law (both state and federal constitutions); (2) statutes and regulations; (3) common law principles; and (4) contract law.

It must be kept in mind from the outset that the law is not the same in the public and private sectors. Federal Constitutional law protects individuals against the arbitrary deprivation of their constitutional freedoms by government and government officials. Students and teachers in public schools are protected by Constitutional law since public schools are governmental agencies and the administrators of public schools are public officials.

Practically, this means that Catholic schools can have regulations and procedures that would not be permissible in a public school. Students can be required to wear uniforms. The expression of free speech can be limited. For example, students and teachers would probably not be allowed to wear buttons criticizing the pope or promoting abortion. Catholic schools have a legal right to make these regulations. If public schools attempted to impose similar rules, they could be guilty of violating the right to free speech as guaranteed by the first amendment.

School board members need this information. A parent or student or teacher might claim that some Constitutional right, such as that of free speech, had been violated. It is important for school board members (and, indeed, for all involved with the school) to understand that a person does not have the same rights in a private setting that one would have in a similar public setting. One can always choose to leave the private setting, of course; but, as long as one chooses to stay, the exercise of certain

freedoms can be restricted. This does not mean that a board can be arbitrary in developing policies. But Catholic schools do not have to accept all the behaviors that the public school has no choice but to accept.

Constitutional Law

There are only two situations in which Catholic or other private schools can be required to grant Constitutional protections: (1) if state action can be found to be so pervasive within the school that the school can be considered a state agent and/or (2) if a compelling state interest, loosely defined as an overwhelming need for an action, can be shown.

Some of the main arguments advanced to prove the presence of state action in private educational institutions are: (1) an institution's acceptance of government monies; (2) the tax exempt status of the private institution; (3) education as a quasi state function (sometimes called a "public benefit theory" since schools, particularly elementary and secondary ones, perform a public service); and (4) state involvement with the school through accreditation or similar procedures and/or statutory requirements with which the school complies.

A relevant case is *Rendell-Baker v. Kohn*, 102 S. Ct. 2764 (1982). This situation involved a dismissed teacher in a private school which received 90-99% of its funding from the government. The Supreme Court ruled that, despite the level of funding, there was no state action in the school. Since the government had no role in dismissal decisions, the school was not required to grant any Constitutional protections to its teachers and, one might assume, to its students. No student or teacher using a state action argument has prevailed in a lawsuit against a private school to date.

Given that private schools have the right to exist and since they are not bound to grant Constitutional protections unless significant state action is found, litigants alleging a denial of Constitutional rights will have to prove the existence of significant state action within the institution before the court will grant relief.

Private school cases indicate that without a finding of state action or compelling state interest, the courts will not hold private schools to the requirements of Constitutional protections. The case law should not be interpreted to mean that private schools can do anything they wish and the courts will not intervene. Case law is constantly being developed and so it is difficult to state hard and fast rules. The fact that no case involving student discipline in the private school has ever reached the United States Supreme Court indicates perhaps the reluctance of the court to intervene in the private sector.

State constitutional law may apply to private as well as public schools. It is not unusual to find a statement such as, "Anyone owning and operating an educational institution in this state shall . . ." As long as whatever is required does not unfairly impinge upon the rights of the private educational institutions and can be shown to have some legitimate educational purpose, private schools can be compelled to comply with the state constitutional requirements.

Statutes and Regulations

Federal and state statutes and regulations govern the public school and may govern the private school as well. Failure to comply with reasonable regulations can result in the imposition of sanctions. The case of *Bob Jones University v. United States* 103 S. Ct. 2017 (1983) illustrates this point. Because of a religious belief, Bob Jones University's admissions and disciplinary policies were racially discriminatory. The Internal Revenue Service withdrew the university's tax exempt status based on a 1970 regulation proscribing the granting of tax exempt status to any institution which discriminated on the basis of race. Before a private school will be forced to comply with a law or regulation, the state's compelling interest in the enforcement of the regulation will have to be shown.

In the *Bob Jones* case, the government's compelling interest in racial equality was sufficient for the court to order Bob Jones University to comply with the anti-discrimination legislation or lose its tax exempt status. In effect, the court said, "We cannot compel you to change your religious belief, but the government will not give you support in the form of tax-exempt status in order to advance this discriminatory belief."

A similar case in a Catholic school is *Dolter v. Wahlert* 483 F. Supp. 266 (N.D. Iowa 1980). The Catholic school was found guilty of sex discrimination when it did not renew the contract of an unmarried, pregnant teacher since the evidence clearly indicated that unmarried male teachers who were known to have engaged in pre-marital sex were evaluated by a different standard.

Federal law prohibits discrimination on the basis of race, sex, handicap, age, and national origin. Although it also prohibits discrimination on the basis of religion or creed, the right of religious organizations to give preference to its own members is upheld. Practically, this means that Catholic schools may give preference to Catholic students and may give hiring preference to Catholic teachers and other employees.

The government cannot pass laws so restrictive that a school's existence is placed in jeopardy. The right of the Catholic school to exist was

firmly established by the Supreme Court in 1925 when a religious order operating a private school brought suit challenging an Oregon statute which would have made public education compulsory. In this landmark case, *Pierce v. the Society of Sisters* 268 U.S. 510 (1925), the Supreme Court declared the statute unconstitutional not only because it interfered with the rights of the school owner, but also because it interfered with the right of parents to choose the education of their children.

Common Law

The third type of law which applies to both the public and private sectors (and, indeed, to all cases, whether school cases or not) is the common law. *Black's Law Dictionary* (1979) defines common law:

> "Common law" consists of those principles, usage and rules of action applicable to government and security of persons and property which do not rest for their authority upon any express and positive declaration of the will of the legislature (p. 251).

Common law principles may also be considered to be derived from God's law, especially by persons in religious schools. Many common law principles are founded in basic morality such as those in the Bible and in other religious writings. Due process or fairness considerations can be considered part of the common law.

In order to discuss common law considerations of fairness, one must understand the meaning of Constitutional due process/fairness. There are two kinds of Constitutional due process: procedural and substantive.

Much has been written about due process, but one of its simplest definitions is that of "fairness." We expect that parties to a suit in court will be treated fairly by the judge and/or the jury. We expect that a person accused of a crime will be told what it is he or she is accused of having done (notice); that he or she will be given a hearing or trial by an impartial party or parties; that the accused will be able to confront the accusers (cross-examination) and call witnesses on his or her own behalf. These expectations are the definition of procedural due process. In a court case, we would also expect that an accused person would be represented by an attorney.

Substantive due process has been defined as meaning that "If a state is going to deprive a person of his life, liberty or property, the state must have a valid objective and the means used must be reasonably calculated to achieve the objective" (Alexander, 1980, p. 343). Substantive due process involves moral as well as legal ramifications: is this action fair and reasonable? In the public sector, substantive due process is present when-

ever a person has property (anything that can be owned, whether tangible or not) or liberty (freedom and/or reputation) interests.

In public school due process cases, justices have called for actions based on morality, a sense of fair play, as much as on what the Constitution does and does not demand. Courts rely on a belief that educators are trying to do what is right. Since educators are assumed to be behavioral models for students, courts hold educators, whether in the public or private schools, to strict standards of "fairness."

While Catholic schools are not held to the Constitution, courts have indicated that they can be held to standards of fairness in accordance with the school's own principles and commonly accepted standards of the behavior of reasonable people. In a case involving a dismissed Catholic school student, the court stated:

> A private school's disciplinary proceedings are not controlled by the due process clause, and accordingly such schools have broad discretion in making rules and setting up procedures for [their] enforcement, nevertheless, under its broad equitable powers a court will intervene where such discretion is abused or the proceedings do not comport with fundamental fairness (*Geraci v. St. Xavier High School*, 13 Ohio Op. 3d 146 Ohio 1978).

The court suggests that, even if state action does not exist in private schools, the schools may still be held to a standard of what it called "fundamental fairness." Fundamental fairness is sometimes used as a synonym for due process, although Constitutional due process requires specific protections as stated in law and interpreted by the courts. Fundamental fairness in a private school, though similar to Constitutional due process, should not be equated with it.

In a private school case similar to *Geraci*, *Wisch v. Sanford School, Inc.*, 420 F. Supp. 1310 (1976), the court scrutinized the school's rules and dissemination of its code of conduct to determine that what it called "contractual procedural fairness" had been given the student. The court specifically addressed the basic fairness provision in a private school-student relationship and stated that such fairness would have been better met if the school had had a written disciplinary code.

Contract Law

In the Catholic school and in any private school, contract law is the predominant governing law. A contract may be defined as: "An agreement between two or more persons which creates an obligation to do or not to do a particular thing" (Black, 1979, pp. 291-92). Generally, the five basic elements of a contract are: (1) mutual assent (2) by legally competent

parties for (3) consideration (4) to subject matter that is legal and (5) in a form of agreement which is legal.

Mutual assent implies that two parties entering into a contract agree to its provisions. A Catholic school agrees to provide an education to a student and, in return, his or her parents accept that offer. A Catholic school offers a teacher a contract and the teacher accepts. If one party does not or cannot agree to the terms of the contract, then no valid contract exists.

Consideration is what the first party agrees to do for the other party in exchange for something from the second party. The Catholic school agrees to provide educational services to a student in return for payment of tuition and adherence to the rules. The school agrees to pay the teacher a salary in return for teaching services.

Legally competent parties implies that the parties entering into the contract are lawfully qualified to make the agreement. A school is legally qualified to enter into contracts to educate students and to employ teachers. Parents are legally competent to agree to pay tuition and meet other obligations (minor students are not legally competent, and so parents or legal guardians must sign contracts on their behalf.) A properly qualified teacher is a legally competent party; a person who does not possess the qualifications needed to perform as a teacher would not be a legally competent party to enter into a teaching contract.

Legal subject matter assumes that the provisions of the contract are legal. An agreement [as a condition of employment] that a female teacher would resign if she became pregnant would probably not be legal, as such a condition would probably be construed as a violation of anti-discrimination laws and Constitutional freedoms as well.

Legal form may vary from state to state. If a contract calls for witnesses and no witnesses' signatures are found on the contract, then the contract is probably not in legal form.

If any one of the five elements of a contract is missing, the contract may be held to be null and void.

Excluding allegations of negligence, cases against Catholic schools are very often breach of contract cases:

> A breach of contract occurs when a party does not perform that which he or she was under an absolute duty to perform and the circumstances are such that his or her failure was neither justified or excused. (Gatti and Gatti, 1983, p. 124)

Breach of contract can be committed by any party to the contract (the school/administrator or the teacher or student). It is generally conceded, however, that it is futile for a Catholic school to bring breach of contract

charges against a teacher who wants to terminate his or her contract; it is highly unlikely that a judge will compel a person to teach against his or her wishes.

While teachers can usually break their contracts without severe consequences, a school can incur serious penalties if it either terminates a teacher's employment or terminates a student's enrollment without just cause during a contract term. Two cases involving breach of contract in the Catholic school illustrate.

In the breach of contract case of a Catholic school teacher, *Weithoff v. St. Veronica School* 210 N.W. 2d 108 (Mich. 1973), the court considered the case of a teacher who had been dismissed from her position because of her marriage to a priest before he was free, according to church law, to marry. The court was careful to note that a church-sponsored school could contractually require teachers and other employees to observe the tenets of its faith. The testimony shows that a new regulation requiring teachers to be practicing Catholics was never promulgated but was simply placed in a file drawer. Since the teaching contract bound the employee to "promulgated" policies, the court held that the school could not legally dismiss the teacher. Obviously, if the regulation had been promulgated, the case might have had a different ending.

Another conclusion was reached in the similar case of *Steeber v. Benilde-St. Margaret's High School* (No. D.C. 739 378, Hennepin County, Minnesota, (1978) in which a teacher protested the non-renewal of her contract following her remarriage after a civil divorce. The court upheld the right of the school to terminate the teacher's contract since she was no longer a member in good standing of the Catholic church.

In the first case, the school breached its contract with the teacher because it failed to promulgate the rule to which it sought to hold the teacher. In the second case in a very similar situation, the court ruled in the school's favor because the school had properly proceeded according to the provisions of its contract.

William D. Valente (1980, p. 464) offers this advice to teachers in private schools who think that their rights are being violated:

> Thus, a teacher who is offended by private school orders that suppress speech, invade privacy, or impose disciplinary sanctions without notice or hearing must look elsewhere than to constitutional doctrines for legal relief, except in the unusual situation where the private school is considered to be engaged in official government action.

The "elsewhere" to which a Catholic school teacher must look is generally contract law.

Three private school student discipline cases illustrate that contract law places obligations on the school as well as on the parents and students.

The 1981 case of *Bloch v. Hillel Torah North Suburban Day School* 438 N.E. 2d 976 involved a first grader expelled in mid- year for excessive absence and tardiness. The parents alleged that the expulsion was in retaliation for the mother's actions. The parents charged that, according to usage and custom, the first year's contract bound the school to providing eight years of education. The court ruled that the school was not bound to continue educating the child because of the highly personalized nature of the educational services. Relying on the principle that the remedy for breach of contract is damages not performance of the contract, the court ruled that the parents could seek money damages from the school.

This case demonstrates the fact that a private school, whether Catholic or any other kind of private school, will not be forced to reinstate a wrongfully dismissed teacher or student. It is important for everyone in the Catholic school to understand this fact. A court could order the reinstatement of a wrongfully terminated public school student or teacher because of the requirements of the Constitution.

At first glance, this ability to employ and to admit whom one wills might seem unfair. Our American system of private enterprise operates on a doctrine of "employ at will." No one can be compelled to remain in a private relationship that is repugnant to him or her. If terminating the relationship violates contractual agreements or basic fairness, the terminating party may have to pay damages in compensation but, at least to date, no private school has been ordered by a court to reinstate a student or teacher, regardless of the reason for dismissal.

Two previously cited cases also illustrate breach of contract. In the *Wisch* case, the court ruled that the school did not breach its contract by expelling the student who had violated school rules. In the *Geraci* case, which involved a student who helped a boy not a student at the school to obtain entrance to the school and throw a pie in the face of a teacher, the court ruled that the student, not the school, had breached the contract.

The importance courts rightfully place on the development, promulgation and implementation of rules is enormous. Since handbooks and other written agreements can be construed as part of the contract existing between the school and students and parents or between the school and it teachers, it is important that as far as possible and practical, rules be in writing.

Courts will look for evidence of good faith: did the institution have a rule? Was that rule promulgated—did the parties concerned—students, parents and teachers—know of the rule? Courts will generally not concern

themselves with the wisdom of the rule—or even with the rightness or wrongness of the rule. The court is only concerned with the existence of a properly promulgated rule or policy and with evidence that the institution acted in good faith according to the procedures it stated would be followed. Courts will look for basic fairness in the execution of the contract between the Catholic school and the student/parent or the teacher when it is alleged that the school acted improperly and so breached the contract.

Catholic school board members, then, should have at least a minimal understanding of civil law and its application to the private sector. At this point in time, the only occasion in which Constitutional protections may be invoked is in the area of discrimination. All other cases alleging deprivation of rights will be judged by contract law and the provisions of the contract existing between the disputing parties.

CHAPTER 3

Tort Liability Of Schools

here is a fifth type of law, tort law, that has implications for schools. Civil lawsuits brought by teachers, parents, and/or students against schools are often in the nature of tort suits. *Black's Law Dictionary* defines a tort as: "[a] private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages" (p. 1335).

Black distinguishes between private torts and Constitutional torts. If a public school official were to be found guilty of a Constitutional tort, such as a deprivation of due process or some other Constitutionally protected right, he or she would be said to be acting under "color of law." A private school official could not normally be guilty of a Constitutional tort because he or she would not be acting as a public official.

A tort is a wrong "other than breach of contract" (Black, p. 1335), therefore, the law governing most tort cases in the private sector will not be contract law but will be the same law which is applied in the public school, tort law.

Torts are one area in which public schools may seem to have more protection than Catholic schools; under the doctrine of sovereign immunity, public officials are granted immunity from liability for torts which resulted from the performance of their official duties. The doctrine had its beginnings in English common law which held that the king, as sovereign, could not be tried without his consent in his own court system (Stern, 1978). This protection would not apply to a Catholic school official, since he or she is not considered a state official. An analogous doctrine of charitable immunity has been successfully invoked by churches and religious schools in some cases in the past. Recently, both sovereign immunity and charitable

immunity seem to have fallen on hard times. Judgments indicate that both government officials and charitable institutions are bound to exercise the same degree of care a reasonable person or group of persons would exercise.

A public school case illustrates. In *Wood v. Strickland* 420 U.S. 308, 95 S. Ct. 992 (1974), public school officials and school board members were held liable for their actions if they knew or should have known that their actions would or might result in the students being deprived of their Constitutional rights. It would seem reasonable to suppose that private school board members would not be allowed to take refuge under charitable immunity if they knew or should have known that their actions could result in harm to individuals.

Tort suits generally can be classified along four categories in schools: (1) those resulting from negligence; (2) corporal punishment; (3) search and seizure; and 4) defamation. Students will most often bring suit under the first three categories; although any one injured on school grounds may also bring negligence suits. Defamation suits may be brought by students who seek to show wrongful expulsion or other disciplinary measures; but it seems more likely that teachers who are disciplined or have their contracts terminated or not renewed will bring defamation suits.

Negligence

Negligence is the most common of all lawsuits filed against teachers and administrators (Gatti and Gatti, 1983). Even though negligence is the "fault" against which schools must most constantly guard, it is also the most difficult type of case about which to predict an accurate judicial outcome. What may be considered negligence in one court may not be considered negligence in another. It is much better, obviously, to avoid being accused of negligence in the first place than to take one's chances on the outcome of a lawsuit.

Gatti and Gatti (1983) have defined negligence as "the unintentional doing or not doing of something which wrongfully causes injury to another" (p. 246) There are four elements which must be present before negligence, in the legal sense, can be said to exist. These elements, which have been defined by many legal writers are: duty, violation of duty, proximate cause, and injury. If any one of the four elements is missing, no negligence and hence, no tort, can be found to exist. Since negligence is an unintentional act which results in an injury, a person charged with negligence is generally not going to face criminal charges or spend time in prison.

An examination of each of the four elements necessary to constitute a finding of negligence should be helpful. First, the person charged with

negligence must have had a duty in the situation. Students have a right to safety, and teachers and school officials have a responsibility to protect the safety of all those entrusted to their care. It is expected that boards have developed policies and administrators have developed rules and regulations which provide for the safety of all.

Board members and school administrators should be aware of the fact that courts may hold them responsible for student behavior and its consequences occurring on school property before or after school. William Valente (1980, p. 358) comments: "Beyond the duty to supervise school grounds during normal operating hours, supervision may be required before and after class hours when students are known to congregate on school grounds." It is important, then, that policies be in place that provide for adequate supervision.

In one case, *Titus v. Lindberg*, 228 A. 2d 65 (N.J., 1967), an administrator was found to be liable for a student injury occurring on school grounds before school hours because: he knew that students arrived on the grounds before the doors were opened; he was present on the campus when they were; he had established no rules for school conduct outside the building, nor had he provided for supervision of the students. The court found that he had a reasonable duty to provide supervision when he knew students were on the property and that students were there as a regular practice. Although there was no school board involved in this case, it is relatively easy to see how board members could be involved if a similar situation were to occur today.

The second element involved in negligence is violation of duty. Negligence cannot exist if the person charged with negligence has not violated a duty. If a teacher is properly supervising a playground and one child picks up a rock and throws it and so injures another child, the teacher cannot be held liable. However, if a teacher who is responsible for the supervision of the playground were to ignore rock-throwing or were to allow it to continue and injury resulted, the teacher would probably be held liable.

If a school board knew that a dangerous situation existed in a school and made no attempt to develop policy to govern the situation, it is very likely that board members could be found to have violated their duties.

The third requirement of negligence is that the violation of duty must be the proximate cause of an injury. The action or inaction of the person must have been a contributing factor to the injury. Simply put, if the person had acted as a reasonable person should act, the injury would not have occurred. In other words, would the injury have occurred if proper supervision had been present? The court or jury has to determine whether or not proper supervision could have prevented the injury and, in so deciding, the court has to look at the facts of each individual case.

The case of *Smith v. Archbishop of St. Louis 632 S.W. 2d 516* (Mo. Ct. App. 1982), which involves a Catholic school, illustrates the concept of proximate cause. In this case, a second grade teacher had kept a lighted candle on her desk every morning during the month of May. She gave no special instructions to the students regarding the danger of a lighted candle. On the morning of a school play, the plaintiff (one who brings a lawsuit) was dressed in a costume partially composed of crepe paper. While the teacher was helping students in another part of the room, the plaintiff's costume caught fire. The teacher had difficulty putting out the flames and the child sustained serious facial and upper body burns, necessitating several operations and painful treatments. The court awarded substantial damages to the child.

The *Smith* case illustrates the concept of foreseeability. The plaintiff did not have to prove that the defendant could foresee that a particular injury (child's catching fire) had to occur; the plaintiff had to establish that a reasonable person could have foreseen that injuries could result from having an unattended lighted candle in a second grade classroom when no safety instructions were given to students.

In cases involving Catholic schools, board members are sometimes sued both individually and in their capacities as board members. In a case such as *Smith*, the court would look for the existence of appropriate policy and of appropriate supervision of the person charged with the implementation of that policy—the principal.

Negligence is a difficult concept to understand fully and it is often difficult to predict what a court will determine to be proximate cause in any particular allegation of negligence. Spontaneous injuries that would have occurred whether or not a supervisor had been present may result in a court's deciding that the institution and the teacher cannot be charged with negligence. The importance of safety procedures and supervisory policies being in place (whether or not an institution is charged with negligence) is obvious.

The fourth element necessary for a finding of negligence is injury. No matter how irresponsible the behavior of the person in authority, there is no negligence if there is no injury. If a teacher leaves twenty first graders unsupervised near a lake and no one is injured, there can be no finding of negligence and, hence no tort. Any reasonable person, though, can see that no one in authority should take risks that may result in injury.

Most negligence cases occur in classrooms because that is where students and teachers spend most of their time. However, there are other areas that are potentially more dangerous than the classroom and, hence, a greater standard of care will be expected from teachers and administrators.

Shop, lab and physical education classes contain greater potential for injury, and cases indicate that courts expect teachers to exercise greater caution than they would in ordinary classrooms. Schools are expected to keep equipment in working order and to keep the area free of unnecessary hazards. It is also expected that students will be given safety instructions regarding the use of potentially dangerous equipment.

Athletics presents another hazard, probably one of the most serious. Clear and Bagley state the nature of the problem (1982):

> First, it must be assumed that litigation can and will arise from each and every [athletic] injury that occurs. This creates an awareness that much is at stake. Second, it must be believed that the only way to avoid liability for injury is to be completely free from cause relating to it. Third, no [school] action can ever be taken or not taken which results in injury to a student. (p. 185)

Even if every possible precaution were taken, the possibility for student injury during athletics is very high. Boards and administrators (who very often are content to let athletic directors and coaches worry about athletic programs) have very real duties to insure that: competent, properly trained personnel serve as coaches for teams; that clear procedures, including documentation, are followed when accidents occur and that there is no delay in seeking medical attention when even the slightest possibility exists that medical help might be needed; and in insuring that equipment and playing areas are as hazard-free as possible.

A common legal standard judging supervision cases is, "The younger the child chronologically or mentally, the greater the standard of care expected." It might be acceptable to leave a group of high school seniors alone for ten minutes in a math class when it would not be acceptable to leave a group of first graders alone. It is reasonable to expect that fifteen-year-olds of average intelligence could observe traffic signals when crossing a street. But it would not be reasonable to expect mentally handicapped fifteen-year-olds to be responsible for crossing the street.

Board members will not, of course, be responsible for actual supervision. But boards are responsible for seeing that appropriate polices and procedures for supervision are in place and are being implemented.

In developing and implementing policies for supervision, the educator and/or board member must keep in mind the reasonableness standard and ask, "Is this what one would expect a reasonable person in a similar situation to do?" No one is expected to think of every possible situation that might occur. A court would not necessarily consider it unreasonable if a school did not have a rule prohibiting throwing chairs; the court would expect, though, that there would be some sort of rule encompassing the possibility of such an activity, for example, "Students are not to throw

objects." No one can foresee everything that might happen; but reasonable persons can assume that certain situations might be potentially dangerous. The teacher in the *Smith* case should have foreseen that second graders might be injured by an open flame.

The best defense for school boards and administrators in a negligence suit is a reasonable attempt to provide for the safety of those entrusted to their care by the development and implementation of rules and policies. The reasonable board is one that ensures that administrators supervise teachers in their implementation of rules and policies.

Corporal Punishment

Corporal punishment is perhaps one of the most controversial topics in education today. The laws of most states allow corporal punishment in public schools under certain conditions and say nothing about the private school.

The private school is not governed by the same rules in regard to corporal punishment as is the public school. Unless corporal punishment is prohibited in all schools by state law, Catholic schools may use it. Because of growing awareness of child abuse concerns as well as psychological considerations, the use of corporal punishment is a legal risk. Private schools are not immune to civil tort cases or criminal charges of assault and battery if corporal punishment results in injuries to the student.

If corporal punishment is to be used in a school, definite policies and procedures governing its administration should be in place. Generally, the following guidelines should be considered in developing such a policy: (1) punishment should be for the correction of the child; (2) no permanent injury should result; (3) only the principal and/or the principal's designate should administer the punishment; (4) punishment must be administered with an appropriate instrument; (5) the maximum number of blows should not exceed three; (6) a witness should be present; and (7) written documentation of the punishment should be kept.

All disciplinary policies, but especially those concerning corporal punishment, should be reviewed by the board annually. Private schools, like public schools, might be well advised to devise other means of discipline than physical ones, both from the standpoint of avoiding lawsuits and from the standpoint of one's school philosophy and good psychology.

Search and Seizure

The 1985 case, *New Jersey v. T.L.O.* 105 S. Ct. 733 recognized the right of public school officials to conduct searches if reasonable suspicion (rather than the stricter standard of probable cause) exists.

Private schools, although not bound to observe even the reasonable cause standard, should, nonetheless, have some kind of policy for searching students and/or seizing their possessions. Searching a student should require "more" cause than searching a locker.

Private schools could be subject to tort suits if harm if alleged to have been done to a student because of an unreasonable search: "Searches of students will have to be conducted according to the 'reasonable person' doctrine of tort law; that test includes not only the manner of the search, but the justification for the search in the first place" (Permuth *et al.*, 1981, p. 65). Catholic school officials could be charged with the torts of assault and battery and/or invasion of privacy.

Defamation

Defamation is the violation of a person's liberty interest or right to reputation. *Black's Law Dictionary* defines defamation as:

> Includes both libel [what is written] and slander [what is spoken]. Defamation is that which tends to injure the reputation; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him. . . . A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. (p. 375)

The potential for defamation to be alleged certainly exists in Catholic schools. It is important that school officials be factual in their comments, whether written or oral, about the conduct of students or employees. The same cautions exist whether one is dealing with students *or* teachers.

Several authors have pointed out that the truth is not always the best defense, since truthful statements can be defamatory (Gatti and Gatti, 1983). Generally, the truth is a valid defense only if the statement was made without malice and to someone with a legitimate right to hear the statement. If a school board member knows that a teacher some years ago obtained an illegal abortion or completed a drug or alcohol rehabilitation program, he or she has no right to communicate that knowledge to a third party who has no legitimate reason for receiving that information.

When making statements or writing entries in records, a person should restrict statements to pertinent facts. The Family Educational Rights and Privacy Act of 1974 changed the rules on record-keeping so that students and parents would be protected, but many schools, including Catholic ones, still place potentially damaging information in school folders. Catholic schools boards should insure that there are record-keeping policies in place that: (1) limit contents of records to what is absolutely necessary; (2)

provide for periodic culling of older records; and (3) limit access to records to appropriate persons (only administrators and professional staff who have legitimate reasons for reading files should have access to them).

In regard to teachers, it is generally held that teachers have legal as well as moral rights to see whatever is in their files. Only school administrators should have access to teacher files. School board members have no legal right of access to student or teacher records.

This chapter on tort liability has discussed several areas of legal concern for Catholic schools and, hence, for persons serving on Catholic school boards.

It is important for board members to understand that they are not responsible for deciding which actions an administrator will take, but for developing the policies that guide the administrator in making decisions.

CHAPTER 4

Duties and Rights Of School Employees

rincipals and teachers are the most important educational employees in a school. There are two broad categories of duties for both principals and teachers.

Principals are supposed to (1) develop and communicate rules and policies and (2) supervise teachers. Almost every activity a principal does can be placed under one of these two categories.

Even though school boards and pastors may have the responsibility for ultimately approving policy, the principal should play a crucial role in developing it. It is hard to imagine a Catholic school board's writing and approving policy without seeking the principal's input. It seems that the best models for policy development are those which follow one of the following two procedures: (1) the principal writes the first draft of the policy and brings it to the board or a board committee for consideration; (2) the principal serves as a member of a committee charged with developing policy in a given area or areas. Board members should see the principal as the educational expert and should utilize that expertise to the maximum extent possible for the good of all segments of the school community.

Principals also communicate policy and provide for its implementation. One of their most serious responsibilities is the supervision of teachers. It is crucial that board members understand that the supervision and evaluation of teachers are not the board's task, but are the principal's responsibility. The principal is supposed to insure that teaching and learning are taking place in the school. In a very real sense, supervision of teachers is quality control for the school.

Supervision of personnel is not simply quality control and assurance that the employee is doing a good job; it is also job protection for the

teacher. If a principal does not supervise a teacher or does so carelessly, it will be very difficult for the principal to support a teacher if allegations are made that the teacher is not doing a good job. If a teacher is faced with a malpractice suit and is charged with not teaching or teaching inadequately concepts and skills that students need (such as reading), the principal is the person best equipped to assist the teacher in meeting those charges. Ideally, the supervisory data that the principal has kept will show that the teacher was teaching concepts and skills in an appropriate manner.

The duties of teachers can also be classified under two headings: (1) implementing rules and (2) supervising the safety and learning of students.

It is important that teachers understand that their role is to implement rules, even if they do not personally agree with them. Lack of agreement is not a reason to fail to enforce a rule. If a teacher cannot support a given rule or policy, that teacher can use whatever channels exist to change the rule, but until a change is made by the appropriate authority, that teacher is obligated to follow the rule. If a person cannot, in conscience, support the action required and change cannot be effected, then that person's only real choice is to leave the situation and seek other employment.

Teachers are responsible for the supervision of the safety and learning of children. It is important for everyone to understand that supervision is both a mental and a physical act. It is not enough that a person be physically present; the person must be there mentally as well. If children were injured while teachers were present, a court will try to determine whether the teachers were and whether the teachers should have been aware of the danger. For example, if two teachers were supervising recess and were conversing with each other and so were not aware of rock throwing taking place in another part of the playground, a court could rule that the teachers failed to exercise mental supervision. It is simply not sufficient that teachers or other supervisors be physically present, that person must be mentally present to the situation. Employees in Catholic schools have fewer rights than do their public school counterparts. To date, no court has found that private school employees have Constitutional freedoms that private schools are legally bound to protect while in that private school setting. Unless state action can be demonstrated, Catholic school employees can claim no protected activities under the Constitution and no due process protections under the Fourteenth Amendment. The only exception is the area of discrimination, as discussed earlier.

Nonetheless, teachers in private schools do have rights. These rights are generally conferred by the contract or agreement existing between the teacher and the school and so, the law of contracts governs the employment situation. State statutes may confer additional rights as well. Teachers may be said to hold rights under the common law. Although the concept of

common law rights is obvious in theory, it is somewhat more difficult to delineate in legal practice. What may seem to be a principle of common law to one person may not seem so to another. One person may consider it immoral to dismiss a teacher for freely speaking his or her mind about administrative practices; another may deem dismissing a teacher for such a reason as perfectly acceptable and, indeed, courts have upheld such dismissals.

In attempting to draw up a listing of teacher rights in Catholic schools, one could look first to the Gospel and then to common law. An appropriate question for anyone involved in Catholic education to ask before deciding on a policy or a course of action would be, "What would Jesus do if He were in this situation? What action would be most in line with the demands of the Gospel?"

An example illustrates. Since most Catholic schools do not have a tenure system (a guarantee of continuing employment), a Catholic school would be well within its rights to terminate the contract of a teacher who could no longer work because of terminal illness. The school probably has no legal responsibility to provide any financial aid to the person. But surely the Gospel demands that, in simple justice, a school do whatever it can for a person who has served it and is now in a position of need.

Discipline and Dismissal

Most cases involving teachers in both the public and private sectors are concerned with teacher dismissals and/or the non-renewal of contracts. Obviously, a decision to dismiss or not renew the contract of a teacher is one that should not be made lightly and only after other attempts at discipline of the faculty member have been made. When a decision is made, the school must proceed according to the policies in place.

Courts will scrutinize the contract to insure that the provisions of the contract have been followed. While a private school contract may be far less involved than a public school contract, it is nonetheless a contract. Courts also construe handbooks and policy statements as part of the contract existing between teacher and employer and can hold Catholic schools to the provisions of such documents.

Public school teachers may be discharged for a variety of reasons. Generally, the following are legitimate grounds for dismissal in the public sector: incompetency, insubordination, incapacity (both mental and physical), immorality (subject to community standards of what is moral), and unprofessional conduct.

Catholic school board members and officials should be familiar with the laws governing the dismissal of public school teachers. The laws can serve as guidelines in developing policies and procedures in dioceses and schools.

A quick survey of the laws of any state will reveal the problems involved in defining the causes for dismissal. What is incompetency? Who decides what it is? When is it serious enough to warrant dismissal?

Courts generally apply "the whole record test" in public school cases except in situations such as criminal conviction or other gross misconduct. In any situation, whether in the public or private school, policies should call for extensive and complete documentation of all evidence supporting a decision to dismiss or not offer a new contract.

While Catholic schools will not be required to reinstate a teacher who has been wrongfully terminated, a court can order the payment of substantial damages to an unfairly dismissed teacher. For legal as well as moral reasons, Catholic schools should develop and follow sound employment policies.

Catholic school teachers are bound to the terms of their contract or agreement with the Catholic school that employs them. Teacher violations of contract terms in Catholic schools can be grounds for dismissal and courts will uphold dismissals based on such violations.

Catholic schools may or may not have tenure. However, courts will scrutinize the policies of an institution which does not have a formal tenure policy to see if there is an informal or formal policy in existence such that *de facto* (tenure in fact) exists. If a Catholic school does not grant tenure to teachers, it should clearly state in a policy or handbook that there is no tenure/expectation that employment will continue beyond a given contract year.

A Catholic school not governed by tenure might have a policy which would provide some type of job security, if not tenure. For example, a school might develop a policy stating that after a specified number of years' service, termination or non-renewal of contract could be invoked only for serious cause and only after certain procedures are followed. Such a policy would give a type of *de facto* tenure security to the teacher while allowing the school to make the provisions it deems best for its particular situation. Since no private school is governed by state statutes regarding tenure (unless the school were to make a regulation stating that it is so governed), wide latitude is possible in developing tenure or other job security clauses in policies and contracts.

One situation in which public school tenured teachers can legitimately be dismissed is *reduction in force* (commonly referred to as RIF). If the student population declines or financial constraints are present, teachers may be dismissed. Today some Catholic dioceses and schools are facing the need to reduce staff. It would be advisable to have reduction in force policies and procedures in place before the decision to reduce staff is made.

A very significant Catholic school teacher employment case arose in New Hampshire in 1982 when four religious sisters brought suit against the school superintendent, the bishop and members of the school board because of their dismissal as principal and teachers in a Catholic school (*Reardon et al. v. Lemoyne et al.* 454 A. 2d 428). This case is the first time a group of Catholic sisters sought legal action against Church officials in a civil court.

Attorneys for the diocese sought to establish that the First Amendment guarantee of the separation of church and state precluded the civil court's becoming involved in this dispute.

The sisters were notified in February that the superintendent did not intend to recommend that their contracts be renewed. The superintendent so notified the parish school board which, in turn, notified the sisters that their contracts would not be renewed because of the superintendent's objections. The sisters then requested a public hearing before the school board. This request was denied on the grounds that they had had no guarantee of continuing employment, and therefore, their situation was one of non-renewal and not of termination.

The crux of the problem seemed to be the language of the contract and the fact that the sisters signed the same contract as did the lay teachers in the school. The language was, at best, ambiguous; at one point, the contract indicated that it would terminate upon the retirement of the employee which was to occur at the end of the school year during which the employee attained his or her seventieth birthday. The policies also stated that if a contract were not to be renewed, the party was to be notified in writing and given well-documented reasons for the non-renewal. The contract contained a further provision that an employee faced with dismissal had a right to a hearing before the members of the parish school board; further, there was a right of appeal to the diocesan school board.

The trial court found that it could only exercise jurisdiction only over the lay members of the school board and not over the superintendent (a member of a religious order) and the bishop because of the doctrine of separation of church and state.

On appeal, the state supreme court found that the doctrine of separation of church and state did not preclude jurisdiction in non-doctrinal contract matters. In essence, the state supreme court found that the trial court should have accepted jurisdiction over the bishop and the superintendent as well as over the school board members. Further, the state supreme court held that the trial court should have ruled on the requests made by the sisters so that their rights would have been protected.

In the end, the case was remanded to the trial court to order the school board to conduct a hearing for the sisters. Subsequently, the sisters and

the other parties settled out of court; the sisters did not regain their positions.

Reardon illustrates the extreme importance of contract language. One cannot ask members of a religious congregation to sign an employment contract and then expect not to be held to the provisions of the contract. The school board should have granted the sisters a hearing because that is what the contract said the board would do when it was requested to do so.

It is not advisable to try to evade termination issues (especially in a case like *Reardon* in which the plaintiffs had each spent between five and twelve years in the school) by attempting to call the termination of a contract a "non-renewal" and, therefore, not subject to whatever protections may apply to dismissed employees. One could distinguish in a contract between non-renewal at the end of a school year and termination during a school year or at the end of a school year, but it would be advisable to seek legal counsel before constructing such a document. Board members and administrators might also want to consider whether that kind of verbal "hair-splitting" is really the fair thing to do.

Catholic schools cannot hide behind the First Amendment's protection of separation of church and state as a cover for any actions they wish to take. The courts have made it clear that they do have jurisdiction over the elements of a contract made with a religious entity, particularly over non-doctrinal issues.

While Constitutional due process is not required of Catholic schools, basic fairness is. For example, a Catholic school would not have to permit a teacher facing dismissal to be represented by legal counsel at a hearing; however, there would probably be a fairness expectation that the teacher would be able to hear and answer charges.

Thus, teachers in Catholic schools have rights which must be protected. Board members and administrators are responsible for knowing what those rights are and for providing protection. Written policies and guidelines greatly facilitate both the knowledge and protection of rights.

CHAPTER 5

Duties and Responsibilities of Board Members

he preceding chapters have attempted to discuss the civil law principles affecting Catholic schools. This chapter will consider specific duties and responsibilities of board members in Catholic schools.

Obviously, board members have responsibilities to the body that owns and/or operates the school. Those duties will usually be found in the Constitution or by-laws of the board.

Generally, a board would approve the budget, endorse programs, set tuition, and establish hiring and dismissal procedures. Depending on whether the board was a consultative board or a board with limited jurisdiction, another party such as a parish council, a pastor, or an official of the religious congregation may have final approval of all policies suggested by a board.

The board would monitor the programs, the budget and the implementation of policy. The principal, who is the board's chief executive officer, would certainly suggest policies and would perhaps write the first drafts of policies. The board would approve the policies (passing them to another party for final approval, as appropriate) and holds the principal accountable for their implementation. The board should, therefore, develop a plan for the evaluation of the principal's job performance.

Duties to Diocese/Church

The school board has definite duties to the diocese and to the larger church. If the school is a parish school or one owned by the diocese, the school board must insure that the policies it develops are consistent with ones already established by the diocese. If, for example, diocesan policy states that only Catholics who actively practice their religion in accordance

with the teaching of the church may be hired in schools owned and operated by the diocese or parishes within the diocese, the local school board must insure that its policies are consistent with those of the diocese. Practically speaking, this would mean that divorced Catholics who have contracted a second marriage without the church's approval are not hired or rehired. (Boards may be very reluctant to terminate the contract of someone in such a situation; however, board members must realize that many injustices are wrought when policies and rules are applied inconsistently or when a local board attempts to act at variance with diocesan policy.)

If the board or specific members of the board cannot agree with a given diocesan policy, then change must be sought through the appropriate channels; a board is not free to adopt a policy at variance with established diocesan policy. The board's responsibility is clear: to uphold the policies of the diocese and to develop local policies which are in harmony with those of the diocese.

The same principles would be true if the school is sponsored by a religious congregation. The board must be ruled by the philosophy and goals of the sponsoring group. However, the relationship between a Catholic school not owned by the diocese and the diocese is not always clearly defined or understood. Such a school would probably be free to have a salary scale that is lower or higher than the diocesan scale. The one non-negotiable area would be that of faith and morals. Any Catholic school exists under the primary authority of the bishop and so is subject to him in the area of faith and morals. As stated in Chapter 2, a school that wishes to be truly Catholic can never be completely independent of the bishop.

Cases involving faith and morals can be very complex and very emotional. For example, it can be very difficult to terminate the contract of a person who has taught effectively in a Catholic school for ten years because that person enters into a marriage that the church does not recognize as lawful. But if a school board retains such an individual in contradiction of existing diocesan policy, it is unfair to expect diocesan support if problems result from the board action. When tensions arise, board members must keep their responsibilities to the diocese and to the church in view. If a board member cannot support a policy (and support does not necessarily mean agreement; it does mean a willingness to live with and not criticize the decision), then the board member's only real choice is to resign from the board.

Duties to the Principal

School boards have responsibilities to the principal. Today many school boards appoint the principal. If the board does not appoint the principal, it

probably has a significant part in the selection process. The board's first responsibility is to insure that the person selected meets the qualifications set by the diocese or sponsoring party.

Since the principal is responsible to the school board (as well as to other appropriate parties, such as the pastor or a religious superior), the principal should report to the board how he or she is insuring that policies are implemented. The board should annually review the criteria and procedures for the evaluation of the principal's job performance. It should further insure that evaluation (at least the board's part of the process) is, in fact, being conducted according to policy. If evaluation is omitted or done casually, problems can result when a board later attempts to call a principal to accountability and/or begins to consider non-renewal of contract. It is certainly not moral, and it may well be a breach of contract for a board to vote for non-renewal or recommendation of non-renewal of a principal's contract without the principal's having had some evaluative feedback and a chance to correct any deficiencies.

Just as supervision and evaluation of faculty is job protection for teachers, so evaluation of the administrator should be viewed as job protection for the principal as well as assurance that the principal is functioning satisfactorily in the position.

If the principal is found to be deficient in job performance and performance improvement plans are not effective, it is the board's responsibility to move into dismissal proceedings unless some other party clearly has that responsibility. It is usually advisable to offer an opportunity for resignation to a principal (or to any other employee who is found professionally deficient). This procedure makes good legal sense and allows the departing employee to retain a measure of dignity.

The principal has the right to expect that the administration of the school is his or her responsibility and that board members will not interfere in the day-to-day running of the school. It is often easy for a board member to succumb to the temptation to get involved in disciplinary matters, academic disputes, and/or faculty/principal problems. The board member has to remember that his or her responsibilities are really twofold: (1) to develop policies and (2) to support the persons and activities that implement those policies.

If the school board really cannot support the principal's decisions, the board should call an executive session (one in which no one other than board members and the principal are in attendance). In that session, board members can state their views and listen to those of the principal. The principal might be asked to develop different policy implementation plans. Goals and objectives are ways of implementing policies; the principal may be able to make modifications that would be acceptable to the board. Ideally,

the board and the principal can come to some understanding and/or compromise. If no compromise can be reached that both parties can support, the board may have to call in an outside facilitator or arbitrator.

Disagreements should be left in the board room. Board members must constantly remember that their power is that of the board when it is in session; there is no power vested in individual board members. Becoming involved in administrative/parent or teacher/parent or administrative/teacher disputes only weakens the authority of both the administrator and the board. The principal, however, should keep board members informed about problem or potential problem situations so that board members will be able to respond in an intelligent manner if they are questioned.

In the end, if the board and/or the pastor or other appropriate party cannot support the principal's administration, the principal will have to leave the situation. There is no more crucial relationship for the success of the educational ministry than that of the board and the principal. That relationship should foster a sound academic experience in a Christian community. When the principal and the board function in an atmosphere in which each respects the rights of the other and in which healthy dialogue and the resolution of differences are promoted, the teaching ministry of the Church should thrive.

As the board has responsibility for the evaluation of the job performance of the principal, the principal has responsibility for the hiring, supervision and evaluation of teachers. As stated in Chapter 4, teacher evaluation is not the board's role. The development of personnel policies is. The board should set policies that call for regular supervision and evaluation of teachers. How the principal implements the policies is his or her responsibility.

Duties to Teachers

The board does have responsibilities to teachers. All schools should have faculty handbooks. The principal is the person who is probably best equipped to make recommendations about what should be in the handbook. Board members should be familiar with all school handbooks. The principal should keep the board informed of any changes in handbooks. This kind of reporting helps to insure that board members are well-equipped to support the school and its administration. Faculty handbooks range in size from a few pages stapled together to books of 100 or more pages. At the very minimum, faculty handbooks should contain the following: an outline of expectations regarding teaching duties should be included; these expectations should involve such areas as the construction of lesson plans, homework policies and grading standards. Non-teaching duties should be addressed. Generally, these duties are more controversial than teaching

duties. Such requirements as cafeteria, playground and study hall supervision should be discussed. The procedures to be followed for field trips should be detailed. If an unfortunate accident were to occur on a field trip and no specific policies were in place, a teacher could rightfully claim that the school board was at fault for failing to insure that proper procedures were followed.

The high school has long been home to many extra-curricular activities. Today more and more such activities are found in the elementary school. Student councils, drama clubs, and musical productions are very much a part of some elementary schools. Athletic programs are growing in the elementary school as well as the high school. Staff members must be found to moderate and coach these activities. The board must insure that whatever is expected of teachers in regard to extra-curricular activities is stated before contracts are signed so that the chances for dispute are minimized.

Job protection for teachers in Catholic schools is a legitimate concern. Although a 1979 case, National Labor Relations Board v. the Catholic Bishop of Chicago, et al. 440 U.S. 490, rendered the creation of new unions in Catholic schools somewhat unlikely, there are unions in some Catholic school systems that existed prior to 1979. If a legitimate union exists, the board must work through it. However, most Catholic schools, particularly our grade schools, are not unionized. Although our schools may not have formal tenure systems, and, indeed, many contracts across the country are year-to-year contracts, the situation of *de facto* tenure as discussed in Chapter 4 may exist. In fact, a Catholic school can create an expectation of continuing employment. If a Catholic school dismissed a teacher who had been working in the school for ten years, the court would look at the policies, procedures and past practices of the school or school system. If teachers are usually retained in the system after three or four years and rarely, if ever, face non-renewal of contract, *de facto* tenure may be found to exist. As discussed earlier in this book, Catholic schools are not bound by Constitutional due process; however, they are bound by common law considerations of fairness.

In the public sector, due process demands that an accused person be given notice and a hearing before an impartial tribunal. Further, the person has the right to question accusers, provide witnesses on his or her own behalf, and the right to have an attorney present. The person has the right to appeal the decision. At the minimum, Catholic school boards should develop policies requiring that a teacher facing suspension or dismissal be told of the charges and be given an opportunity to refute them. Some process of appeal should be in place. In most dioceses, the bishop will be the last "court of appeal." The important point is that there be some avenue of appeal for a teacher who has been in the Catholic system for a period of

time that would have resulted in tenure if he or she had been in the public system.

If the school or the diocese does not have a grievance procedure, the pastor (or religious superior in a school owned by a religious congregation) should initiate a plan to develop one to insure that teachers are treated fairly. What constitutes matter for a grievance should be clearly stated. Every disagreement a teacher has with a principal is not a potential grievance. Only serious situations which cannot be solved through other channels should be brought to a grievance procedure. The local board has a responsibility to respect the grievance procedure and to encourage persons to utilize the procedure when appropriate.

Duties to Parent/Student Community

A fourth group to which the board has specific responsibilities is the parent/student community. All schools should have a parent/student handbook in which the policies that affect parents and students are explained. Some areas that should be included are: admission policies, academic policies, the procedure for communication between parents and teachers and/or administration, the discipline code, rules concerning extra-curricular activities, field trip policies and forms, emergency procedures, parent service and fund-raising requirements, and the role of the school board.

Parents should be informed about the function of the school board and about the policies governing attendance at school board meetings, speaking at school board meetings, and bringing matters to the attention of the school board. School boards must guard against becoming a "dumping ground" for complaints. Only serious matters which appropriately belong before the school board should be considered and then, only after all other channels have been exhausted. School boards should not become involved in matters which are the province of principals or teachers.

Board members have serious responsibilities to the church, to the diocese, to the parish or parishes that sponsor the school, to the sponsoring religious congregation, to the principal, to teachers and staff, and to parents and students. The role of the board member is to oversee good school operation and effective ministry through the development of sound policy.

Board members must understand that they can be held personally liable if they knew or should have known that a certain policy or action violated a person's rights. In these days of increasing litigation, board members need liability insurance. As a matter of simple justice, those owning schools should make every attempt to obtain liability insurance for those who serve on boards. However, if the school, parish or diocese cannot provide the insurance, board members should obtain their own coverage.

CHAPTER 6

Conclusions and Recommendations

atholic school board members should familiarize themselves with the law as it affects both private and public schools. Since Catholic school board members are responsible for the development of policies, familiarity with law will be most helpful. Catholic school board members should be cognizant of the principles of law involved in landmark court decisions and should be able to understand the courts' reasoning; in so doing, board members should be able to apply the appropriate concepts to their own policy making.

Although Catholic schools are not bound by all the constraints that public schools are, knowledge of those constraints should aid the Catholic school board member in developing policies that are fair and equitable. Just because a Catholic school is not legally bound to do something does not mean that the thing should not be done if it seems the morally right thing to do. Catholic school boards should always be concerned with respecting the dignity of principals, teachers, other school employees, parents and students as human beings. For example, a Catholic school may be able to dismiss a teacher without giving a reason by simply not renewing the teacher's contract. However, one should ask if that is really the fair thing to do? Is it moral? Is this what I would want or expect someone to do to me if I were in the teacher's position?

Torts

As discussed in Chapter 5, the law of torts is basically the same for private and public school officials. Certainly one of the best recommendations that could be made to Catholic school board members is to strive always to act in a manner that is respectful of the dignity, rights and safety of all those in the Catholic school.

Since most torts arising in schools are negligence cases, boards should develop clear policies regarding safety and supervision. Principals should insure that teachers know what they are supposed to do and that they are doing it.

One major potential safety and supervision area needs to be addressed by school boards. That is the issue of the the use of school buildings and grounds. The problem of students present in school buildings and on school grounds without adult supervision is a lawsuit waiting to happen. Court decisions, some of which are over twenty years old, indicate that schools can be held responsible for accidents on playgrounds before and after school. Some schools have a policy stating that children are not to arrive before a specified time and are to leave by a certain time. But it is a policy or rule that is often not enforced. No one wants to be insensitive to the problems of working parents; however, it is not fair for parents to assume that it is permissible to drop children at school very early in the morning and/or to pick them up very late in the afternoon. It is also unfair to assume that teachers who arrive at school before they are required to be present or who stay late will be responsible for children. Finally, it is not fair to assume that the principal can watch children who arrive early or that he or she will remain until six or seven o'clock at night. If a child is injured while on school property during an unsupervised time, a court will look to the parent/student handbook to see if a policy is in place and if it has been enforced.

Athletic practices are posing problems as well. In some parishes students who do not attend the parish school can play on the team; in effect, this means that the team is not a school team but rather a parish team. Thus, the pastor and the board cannot expect the principal to be responsible for the supervision of team members from the time school is dismissed until practice begins and/or the coach arrives. If the team is a school-sponsored one, the problem is really the school board's and the pastor's. If it is a parish team, it may be the parish council's and the pastor's. In any case, the board can certainly develop policy; the board can require its implementation in the case of a school team and recommend its implementation to a parish council in the case of a parish team.

There are several possible approaches to this supervision problem. One is to post "no trespassing" signs and enforce a policy of no presence on school grounds outside specified times. If a student is on the grounds at a time when no supervision is provided, the parents should be notified. Appropriate warnings and penalties should be given. The board might want to consider a policy that would require parents to withdraw a child from school after repeated offenses. The board would develop the policy; the principal would determine how to implement it.

Another approach would be for the board to appropriate funds to pay a responsible adult to supervise an hour before and an hour after school. With more and more schools adding day care and after school care programs, another solution is possible. A policy could be developed stating that any child who is present in the school building or on the grounds at unlawful times will be placed in day care and the parents will be billed for the service. In the case of the secondary school, other approaches need to be explored.

There are, of course, many options. The important point is to do something. Boards should not take refuge in the belief that since nothing has ever happened, nothing ever will happen. A single lawsuit could be very costly and perhaps could be avoided if policies and procedures are developed and enforced.

In this day of increasing litigation, it is good for a board member to consider the risks of being charged with defamation. Board members, especially chairpersons, are often asked to write recommendations for departing teachers and/or principals. People are generally familiar with the the problems of writing legally non-controversial recommendations for persons without sacrificing the truth.

No person has an absolute right to a recommendation, and board members may legitimately refuse a request for a recommendation. Boards should guard against making "deals" with employees who have not met job expectations; too often, resignations are given in exchange for good recommendations. If the board would not reemploy the person, it is not just to pass problem employees on to another school. A letter verifying employment and stating duties could be given as an alternative.

The guideline is, of course, to be as fair as possible. Board members should strive to be fair and respectful of the dignity of others in all communications (whether official or not) and to be sure that what is said can be shown to have some valid relationship to the professional situation.

Handbooks

The beginning point for policy development should be the school's philosophy. Every school should have a clearly written philosophy that is available to teachers, parents and, as far as possible, to students. Even very young children can be brought to some understanding of philosophy: "At our school we try to treat each other the way Jesus would want us to treat each other." The life of the school should be seen as flowing from the philosophy.

The school board should annually review and accept all faculty, parent and student and/or parent/student handbooks as a matter of policy. If

policies are clearly written, there is less likelihood that serious problems will arise. Handbooks contain rules and regulations as well as policies; the board's acceptance of them will strengthen the positions of both the administrator and the board.

Every school should have some sort of written student handbook even if it is only a few pages in length. School boards might also consider having parents and students sign a form stating they have read and/or discussed the rules and agree to abide by them. Having a written handbook should encourage the school to strive for clarity in rule making. Periodic evaluation should enable the school to make necessary changes in rules.

When considering the development of policies, board members and administrators must be aware that there is a time investment involved. If a person is allowed to tell his or her side of the story, school personnel are committed to spending time with people.

An example from student discipline will illustrate. The administrator is committed to listening to the student's side of the story as well as the teacher's. But the benefit should be obvious: students perceive persons in authority as trying to be fair and, one hopes, will internalize the values that are modeled. If a student sees an administrator behaving in a manner that is respectful of the dignity of students, he or she may be more likely to afford that same respect to others. Board members can certainly think of analogous situations. Certainly, persons in authority in Catholic schools should be acting from a desire to serve in ministry, not from a desire to wield power. Acting in a manner worthy of ministry in Catholic education will insure that a school is acting according to "fundamental reasonableness" and, in the case of litigation, will offer a sound defense.

Catholic schools, then, should be committed to notice and to a hearing in any student discipline case; in this way, the school acts in a fair and moral manner. This commitment would mean that the student is told what he or she did that was wrong and that an opportunity for hearing the student's side of the story be given.

Somewhat more extensive policies and procedures should be developed if the penalty is suspension. One-day suspensions should require that the parents be notified. Longer suspensions should involve written notification specifying the charges and stating the time and place of the disciplinary hearing. Cases in which the possibility of expulsion exists require written notification and a more formal hearing at which the student and/his or her parents should be able to confront the accusers. Careful documentation should be made in all disciplinary proceedings.

The right of students and teachers to legal counsel in suspension and/or expulsion hearings is a controversial topic, even in the public school (Phay, 1977). In the private school, the issue is quite complex (Echols and

Casey, 1979). Catholic school board members should understand that there is no legal requirement that a private school permit legal counsel for a student or teacher to be present at a hearing; however, if the school grants that privilege to one person, a precedent could be set requiring that all persons in similar situations be allowed the benefit of legal counsel. Obviously, the decision to allow legal counsel in student or teacher disciplinary proceedings in Catholic schools is not an easy one. School board members should weigh the advantages and disadvantages carefully and should consult with legal counsel before developing policy.

Although Constitutional due process has not yet been found to apply to private schools (unless the school explicitly grants that right to its students), courts do look for fairness in the school's dealings with its students. Many experts believe that private schools should follow minimum due process procedures because of the demands of simple justice. It seems better to practice preventive disciplinary measures in one's rules and procedures than to test their validity in a court room.

Since Catholic schools are bound by anti-discrimination legislation, boards should be sure that policies stating that the school complies with the legislation should be in place. Where reasonable accommodation on the part of the school would make a handicapped student or teacher able to be present, the school should make that accommodation. In all areas except religion, Catholic schools should not and cannot discriminate without repercussions. These areas are race, color, national origin, sex (unless traditionally a single sex school), handicap, and age. Since it is illegal to discriminate against anyone under the age of 70, on the basis of age, Catholic schools must be very careful in employment procedures. It is not legal to give preference in hiring to persons on the basis of age. The only exception would be in the case of true financial exigency, when a school honestly could not pay the salary of a more experienced, older teacher.

The above recommendations may be helpful to Catholic school board members and administrators as they attempt to develop, modify and implement rules and policies. Ultimately, the guiding principle in any development, modification and/or implementation of policies and/or rules should be the desire to act in a reasonable, moral way consistent with the Gospel, with the school's philosophy and with the principles of common law.

Common law demands that every individual try to treat every other individual in a fair manner; but even beyond common law, there is a moral imperative in acting fairly.

To help achieve fairness, boards should be sure that the employment contract is clear and outlines the specific expectations that the school has for the teacher's conduct. Since handbooks can be construed by the courts as an extension of the contract, boards and administrators should strive to

establish clear, reasonable rules and policies. In the same way, the board should review the parents' contract with the school, both the parent or parent/student handbook and the written contract, where applicable. Schools may wish to consider a written contract that spells out the school's responsibilities and obligates the parents to the payment of tuition and to honoring the policies and rules contained in the handbook.

Due Process

Although Catholic schools are not required to follow Constitutional due process procedures, there is much to be learned from the public schools in this area.

It seems that the Gospel would demand that at least the minimum requirements of due process be afforded to teachers and students in Catholic schools. It would also seem wise, ethical and within the dictates of common sense to grant a minimum of due process.

Justice and common sense would indicate that Catholic schools should strive towards reasonable fairness, if not towards Constitutional due process. The rudiments of due process should be met in any conflict: notice and hearing before an impartial tribunal. The contractual rights of teachers, parents and students should be a concern of every Catholic school. The courts have indicated that private schools can be held to a standard of fundamental reasonableness, and it is by that standard (as well as the Gospel) that Catholic schools should seek to judge actions, whether or not court action ever becomes a reality.

A Final Note

The development of private school law has been slower than the development of public school law. As this book has indicated, however, lawsuits against schools in general and Catholic schools in particular, are on the increase. No longer can Catholic schools expect the judicial restraint that kept courts from intervening in the past. Courts are holding all private schools to a standard of fairness as well as to the tenets of contracts made with parents and/or students.

Catholic schools and other church-related private schools formerly found almost absolute immunity from successful litigation in the doctrine of separation of church and state. Cases arising over the last several years indicate, however, that courts can and will intervene in non-doctrinal aspects of the Catholic school's operation.

Catholic school personnel and board members can no longer afford to be ignorant of the law as it pertains to them and to their institutions.

Ignorance can prove costly both in terms of finance, time, and the failure to model Gospel values. Study of private school law can provide Catholic school officials and board members with the knowledge and the tools needed to avoid being sued.

Knowledge of school law can help Catholic school boards avoid lawsuits and can help persons be more effective board members. Justice and common sense seem to demand that Catholic school board members, striving to be faithful to the mission and philosophy of their institutions, would seek knowledge of private school law.

In the final analysis, each person—board member, pastor, principal, teacher—has to answer to his or her conscience. School law is a kind of watchdog over the behavior of school officials. Catholic school board members have been given a great trust, and if they possess wider latitude in governing their institutions than do their public school counterparts, it seems that their responsibilities are also greater.

Jesus' plea for integrity in the lives of his disciples is, perhaps, the best advice that a Catholic school board member could ponder: "What will a person gain by winning the whole world at the cost of one's true self? Or what can one give that will buy that self back?" Fidelity to their own highest principles and to Gospel calls should insure that Catholic school board members remain well within the parameters of law, both divine and human.

Glossary of Terms

Board
A board (committee/council/commission) is a body whose members are selected or elected to participate in decision-making in education at the diocesan, regional, inter-parish, parish level, or private school level.

Board with Limited Jurisdiction. A board with limited jurisdiction has power limited to certain areas of educational concern. It has final but not total jurisdiction.

Consultative. A consultative board is one which cooperates in the policy-making process by formulating and adopting but never enacting policy. (CACE/NABE, p. 59)

Collegiality
Collegiality is a sharing of responsibility and authority. In the Catholic Church, bishops have the highest authority within a diocese. Powers may be delegated to other parties, such as boards.

Common Law
Common law is that law not created by a legislature. It includes principles of action based on long-established standards of reasonable conduct and on court judgments affirming such standards. It is sometimes called "judge-made law."

Compelling State Interest
Compelling state interest is the overwhelming or serious need for governmental action. The government is said to have a compelling state interest in anti-discrimination legislation or the equal treatment of all citizens.

Contract
A contract is an agreement between two parties. The essentials of a contract are: (1) mutual assent (2) by legally competent parties (3) for consideration (4) to subject matter that is legal and (5) in a form of agreement that is legal.

Consensus
As distinguished from majority rule, consensus is a model of decision-making in which a board seeks to arrive at a decision that all members can agree to support.

Defamation
Defamation is communication that injures the reputation of another without good reason. Defamation can be either spoken (slander) or written (libel).

Due Process

Due process is fundamental fairness under the law. There are two types:

Substantive Due Process: "The constitutional guarantee that no person shall be arbitrarily deprived of his life, liberty or property; the essence of substantive due process is protection from arbitrary unreasonable action" (Black, p. 1281) Substantive due process concerns *what* is done as distinguished from *how* it is done (procedural due process).

Procedural Due Process: how the process of depriving someone of something is carried out; *how* it is done. The minimum requirements of Constitutional due process are *notice* and *hearing* before an *impartial tribunal.*

Executive Session

An executive session is a closed meeting to which only members of the board are admitted. If the board is discussing the evaluation of the job performance of a board member, such as the principal, that person may be asked to leave the meeting during the discussion.

Foreseeability

Foreseeability is "the reasonable anticipation that harm or injury is a likely result of acts or omission." (Black, 584) It is not necessary that a person anticipate that a specific injury might result from an action, but only that danger or harm in general might result.

Landmark Court Decisions

Landmark court decisions are decisions of major importance. These decisions are often used as part of the judicial reasoning in later decisions.

Negligence

Negligence is the absence of the degree of care which a reasonable person would be expected to use in a given situation.

Policy

A policy is a guide for discretionary action. (CACE/NABE, p. 61) Policy states *what* is to be done, not *how* it is to be done.

Private School

A private school is a school owned, operated and financed by a religious community or by a board of trustees. (CACE/NABE, p. 62)

Proximate Cause

Proximate cause is a contributing factor to an injury. The injury was a result or reasonably foreseeable outcome of the action or inaction said to be the proximate cause.

Respondeat Superior

Respondeat Superior is a principle of civil law that requires that a superior be responsible for the actions of subordinates.

State Action

State action is the presence of the state (government) in an activity to such a degree that the activity may be considered to be that of the government.

Tenure

Tenure is an expectation of continuing employment.

De Facto* Tenure:** *De facto* tenure is an expectation ***in fact that employment will continue, in the absence of a formal tenure policy. *De facto* tenure can result from past practices of an employer or from length of employment.

Bibliography

Alexander, Kern (1980). *School law. St. Paul: West.*

Black, Henry Campbell. Black's law dictionary. (5th ed.). St. Paul: West.

Bloch v. Hillel Torah North Suburban Day School, 438 N.E. 2d 976 (1981).

Chief Administrators of Catholic Education/National Association Boards of Education. (J. Stephen O'Brien, ed.) *A Primer on Educational Governance in the Catholic Church.* Washington: National Catholic Educational Association, 1987.

Clear, Delbert and Bagley, Martha. (1982). Coaching athletics: a tort just waiting for a judgment? *NOLPE School Law Journal, 10* (2), 184-192.

Dolter v. Wahlert, 483 F. Supp. 266 (N.D. Iowa 1980).

Echols, Robert M., Jr. and Casey, Steven F. (1979). Comments: the right to counsel in disciplinary proceedings in public and private educational institutions. *Cumberland Law Review 9,* 751-766.

Gatti, Richard D. and Gatti, Daniel J. (1983). *New encyclopedic dictionary of school law.* West Nyack, NY: Parker.

Geraci v. St. Xavier High School, 13 Ohio Op. 3d 146 (Ohio 1978).

New Jersey v. T.L.O., 105 S. Ct. 733 (1985).

Permuth, Steve, *et al.*, The law, the student and the Catholic school. Washington: NCEA.

Phay, Robert E. (1977). The law of procedures in student suspensions and expulsions. Topeka: NOLPE. (ERIC N. EA 009 345).

Pierce v. the Society of Sisters, 268 U.S. 510 (1925).

Reardon *et al.* v. LeMoyne *et al.*, 454 A. 2d 428 (N.H. 1982).

Rendell-Baker v. Kohn, 102 S.Ct. 2764 (1982).

Smith v. Archbishop of St. Louis, 632 S.W. 2d 516 (Mo. Ct. App. 1982).

Steeber v. Benilde—St. Margaret's High School, (No. D.C. 739 378, Hennepin County, Minnesota, 1978).

Stern, Ralph D. (1978). The principal and tort liability. In R. D. Stern (Ed.). *The school principal and the law* (pp. 205-220).

Titus v. Lindberg, 228 A. 2d 65 (N.J., 1967).

Valente, William D. (1980). *Law in the schools.* Columbus: Merrill.

Weithoff v. St. Veronica School, 210 N.W. 2d 108 (Mich. 1973).

Wisch v. Sanford School, Inc., 420 F. Supp. 1310 (1976).

Wood v. Strickland, 420 U.S. 308, 95 S. Ct. 992 (1974).

Index

Accommodation, 39
Accountability, 29, 31
Accreditation, 6
Administrator(s), 5, 10, 16, 17, 19-22, 28, 31, 32, 38, 39, 46
Advisory, 1
Age, 7, 39
Anti-discrimination, 7, 10, 39, 43
Appeal, 27, 33
Athletic(s), 19, 33, 36, 46
Attorney(s), 8, 27, 33
Bishop(s) 2, 3, 27, 30, 33, 43
Boards with limited jurisdiction, 1
Breach of contract, 10, 11, 12, 15, 31
By-laws, 29
Charitable immunity, 15
Collegiality, 1, 3, 43
Compelling state interest, 6, 7, 43
Consensus, 1, 2, 3, 43
Consultative board, 1
Contract, 5, 7, 9, 10, 11, 12, 13, 15, 24, 25, 26, 27, 28, 30, 31, 33, 35, 40, 43
Corporal punishment, 16, 20
Damages, 12, 15, 18, 26
Defamation, 16, 21, 37, 43
Dioceses, 1, 2, 25, 26, 29, 30, 31, 33, 34
Discipline, 6, 12, 20, 25, 34, 38
Discrimination, 7, 13, 24
Dismissal, 6, 12, 25, 26, 27, 28, 31, 33
Divorce, 11, 30
Documentation, 19, 20, 26, 38
Due Process, 8, 9, 15, 24, 28, 33, 39, 40, 44
Employees, 7, 11, 21, 23, 24, 28, 35, 37
Fairness, 8, 9, 12, 13, 28, 33, 39, 40, 44
Foreseeability, 18, 44
Handbooks, 12, 25, 32, 37, 40
Handicapped, 7, 19, 39
Immorality, 25
Immunity, 15, 16, 40
Incapacity, 25

Incompetency, 25
Insubordination, 25
Landmark case, 8, 35, 44
Liability, 15, 19, 22, 23, 34, 46
Libel, 21, 43
Malpractice, 24
Morality, 8, 9
Negligence, 10, 16, 17, 18, 19, 20, 36, 44
Non-renewal of contract, 11, 25, 26, 27, 28, 31, 33
Non-teaching duties, 32
Notice, 8, 11, 33, 38, 44
Parents, 8, 10, 12, 13, 15, 21, 34, 35, 36, 37, 38
Parishes, 2, 29, 30, 34
Pastor, 1, 2, 29, 31, 32, 36, 41
Playground, 17, 24, 33
Policies, 1, 2, 3, 6, 7, 11, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40
Privacy, 11, 21
Promulgation, 12
Proximate cause, 16, 17, 18, 44
Reasonableness, 19, 38, 40
Record-keeping, 21
Reinstatement, 12
Searches, 20, 21
Students, 3, 5, 6, 7, 9, 10, 12, 13, 15, 16, 17, 18, 19, 21, 24, 34, 35, 36, 37, 38, 39, 40, 41
Supervision, 17, 18, 19, 20, 23, 24, 31, 32, 33, 36
Suspensions, 38, 46
Teacher(s), 5, 6, 7, 10, 11, 12, 13, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 38, 39
Tenure, 25, 26, 33, 45
Tort, 15, 16, 18, 20, 21, 22, 46